

Chapter 9: Legal and Liability Issues

Although this chapter may be used as a guideline for legal and liability issues, it is recommended you contact your local County Counsel on these matters.

RISK MANAGEMENT

Every effort should be made to minimize the potential for injury, damage or loss in all aspects of district operation; however, accidents occur and law suits are a potential. If a claim is made against an SWCD, the claimant must sue for damages. The Indiana Tort Claims Act (or possibly the Federal Tort Claims Act) is the first line of defense for an SWCD in such a lawsuit. A liability insurance policy, such as the one provided by the IASWCD is secondary, and will be in effect in the event the Tort Claim is turned down by the State of Indiana.

The Tort Claims Act is not insurance, it is defense protection for a lawsuit resulting from district operation.

Sec. 1 Tort Law

Indiana Tort Claims Act

The Indiana Tort Claims Act may protect SWCDs against claims or suits brought in civil action. Under the act, district supervisors, , or employees acting within the scope of their employment are not liable for losses resulting from a variety of causes, nor is the district liable for punitive damages. The Governor may compromise or settle a claim/suit brought against the district. The Attorney General advises the Governor concerning the desirability of such compromise or settlement and provides for the defense of the district.

Under the terms of the Indiana Tort Claims Act, a claim against a district is barred unless official notice is filed with the Attorney General within 270 days after a loss occurs. *Any district involved in an incident that might lead to a claim should inform the potential claimant of the filing requirements.*

Federal Tort Claims Act

The Federal Tort Claims Act may provide liability protection against claims arising from professional errors or automotive accidents involving NRCS vehicles on official government business by SWCD employees. NRCS regulations state that a non-federal employee performing NRCS official business in cooperation with a federal employee is an agent of the federal government. This implies that an SWCD employee performing work for NRCS is covered by the Federal Tort Claims Act. An interpretation of whether the SWCD employee was performing NRCS work, in the event of a claim, has to be determined on the specifics of each case.

Initiating a Claim

1. When a district learns that a liability claim is to be filed against it, supervisors should immediately contact their ISDA District Support Specialist and the IASWCD.
2. Under the terms of the Indiana Tort Claims Act, a claim against a district is barred unless official notice is filed with the Attorney General within 270 days after a loss occurs. *Any district involved in an incident that might lead to a claim should inform the potential claimant of the filing requirements.*
3. The Notice-of-Tort-Claim Form (*see sample at: http://www.in.gov/indot/files/tort_claim.pdf*) must be filed both with the district and with the Attorney General. It must describe in clear, concise language the facts upon which the claim is based. The notice should include: (a) time and place of the incident, (b) how the incident and loss occurred, (c) names of all persons involved, including witnesses, (d) type and amount of injury or property damage, and (e) claimant's address. The notice must be delivered either in person or by registered or certified mail to: Office of the Attorney General, Attn: Tort Claims Investigations, IGCS-5th Floor, 302 West Washington Street, Indianapolis, IN 46204.
4. Within 90 days of the filing of a claim, the Attorney General shall notify the claimant in writing of the approval or denial of the claim. A claim is denied if the Attorney General fails to approve the claim in its entirety within 90 days. If the claim is denied by the Attorney General, the claim may then be filed with any secondary insurance the SWCD may carry.
5. If it is determined that the loss is not covered under the Indiana Tort Claims Act or the Federal Tort Claims Act with NRCS, the SWCD should contact its secondary insurance agent and provide the required information. Information may include:
 - * Insured's name and address.
 - * Special multi-peril policy number (65-7-1065708).
 - * Date and time of accident or incident.
 - * Nature and location of accident or incident.
 - * Claimant's name, address, and telephone number.
 - * Name of law enforcement agency which did the investigation, if applicable.
 - * Estimate of damaged equipment.

6. In case of questions during the claim process, contact your District Support Specialist, the Indiana State Association of SWCDs, and the servicing agent of the insurance carrier to inform all parties of the nature of the problem.

Sec. 2 Insurance Issues

ROUTINE EVENT LIABILITY COVERAGE

Secondary liability insurance is carried by IASWCD for routine (basic) SWCD activities and events such as field days, pond clinics, education events, trainings and other similar activities. It is to be noted that any “transportation” within an event (such as hay ride style, etc. conveyance) is not currently covered under the policy at the time of this printing. The SWCD should be familiar with the current policy coverage and its limitations. Contact the IASWCD for details of current policy coverage.

SPECIAL EVENT COVERAGE

Over the years many events have developed which are beyond what is considered to be normal or basic SWCD events. Examples of events considered to be ‘beyond normal’, or ‘basic’ SWCD events include but are not limited to:

River rafting; Air plane tours of farms and properties; Forestry field days where chainsaw demonstrations are given to fell trees and do timber stand improvement

If such an event is planned, it is recommended that an SWCD obtain specific event insurance to assure that the additional exposure of such events is adequately covered with insurance. (Contact IASWCD if more information is needed on specific insurance needs)

INSURING DISTRICT PROPERTY

SWCD equipment, vehicles, buildings (including storage buildings and garages), land or other property is not covered by any blanket insurance policy held by IASWCD or any other agency. Districts must plan to carry individual policies to assure that coverage exists. In some instances agreements may be developed with one’s county for coverage under blanket, county owned policies; however, this is to be done on an individual basis. County / SWCD relationships vary throughout the state and not all counties permit SWCDs on county policies.

Sec. 3 Equipment Leasing

Many districts own or lease conservation equipment to be used by clients. It is important to assure that a liability waiver form is utilized each time a piece of equipment is rented/leased; and that clients read, understand the provisions of the form and sign it prior to using equipment.

Clients must have **vehicle insurance**. In the case of SWCD conservation equipment pulled by a client’s vehicle, the (equipment) liability is assumed by the insurance coverage of the towing vehicle.

A copy of the signed agreement should be provided to the client and the original should be filed in the SWCD office.

Note that the standard liability waiver form has been amended very slightly from the earlier version and now includes a line that the client verifies that he / she has current insurance on the tow vehicle.

The sample form is on the following page and may be duplicated for District use:

EQUIPMENT LEASE/RENTAL LIABILITY WAIVER FORM

_____ County Soil and Water Conservation District

Address: _____

City / State / Zip: _____

Telephone number: _____

Prior to taking District owned equipment into your possession, this form must be completed and returned to the District for approval.

I, _____, anticipate leasing the District's _____ for the following purpose to _____ on _____ acres. I anticipate picking-up the equipment on _____ and returning it on _____.

I understand that I am responsible for this equipment while it is in my care, custody, and control. I confirm that Insurance is current on the vehicle towing the equipment.

I also understand that I am responsible for the following:

- to perform an inspection of the equipment for damage prior to taking it into my possession and to report any damage to the District office immediately;
- to immediately contact the district when I pick up and return the equipment;
- to report the number of acres actually covered to the District when I return the equipment;
- to assume responsibility for any repairs due to my negligence or use, excluding ordinary wear and tear, while the equipment is in my possession;
- to be responsible for the transport of the equipment from a previous job, or to and from the District parking lot; and,
- to provide payment of the District at the rate of \$ _____ per acre within _____ days of the billing.

The following customer information is requested:

Name: _____ Telephone: _____

Address: _____ City/State/Zip: _____

Date requested: _____ Customer Signature: _____

The above information was reviewed and approved by _____,
District representative, on _____.

Dates equipment actually picked up and used: _____ to _____. Acres covered _____

Additional insurance information for districts to consider

An SWCD may require participants in events to sign a liability release form to participate in events. Extension has this provision in some of its events.

In the event a vendor or sponsor put on an event on the SWCD's behalf, it is best for the SWCD to obtain a "Certificate of Insurance" from the group naming the SWCD as an 'additional insured' on the policy. This move proves that the group has liability insurance and to be named on the policy adds a very important "layer" of insurance for the SWCD.

Vehicle use:

A number of SWCDs own vehicles. It is important to assure that adequate insurance is maintained on district owned vehicles. In the event the county will not provide insurance under its blanket vehicle policy, it is necessary to carry an independent policy of insurance.

Some districts utilize NRCS vehicles and motorized equipment. It is necessary to comply with the provisions of NRCS when utilizing their equipment.

Sec. 4 Reporting, Retention, and Disposal of Records

Chapter 6, entitled "Receiving, Managing, and Disbursing Funds" (section 7), and Chapter 7 (section 3) both discuss records retention and disposal rules in more detail. The following reiterates the basics:

Records of an SWCD are official documents and must be maintained for a period of time which is determined by law. IC 5-15-1-1 states that these records must be protected; it further states that a local public records commission is to be established in each county. IC 5-15-6-3(f) concerning destruction of public records, states in part: "Original records may be disposed of only with the approval of the commission according to guidelines established by the commission."

Chapter 12 of the Indiana State Board of Accounts Accounting and Uniform Compliance Manual for Special Districts, has to do with the county adopting the retention schedule prescribed by the State Oversight Committee on Public Records. It can be viewed at: http://www.in.gov/sboa/files/SPCDST12_2006.pdf . If you wish to dispose of records not included on the retention schedule, you must contact the County Records Commission. The Clerk of the Circuit Court serves as the Commission Secretary.

Sec. 5 Open Door Law

Actions made by public agencies must be accessible to the citizens. The Indiana Open Door Law (IC-5-14-1.5) provides the details which must be met in order to keep the public informed as to meeting notification, expenditure of public funds and basic recording of meeting proceedings.

SWCD meetings are to be ‘public meetings’ which allow anyone to attend for the purpose of hearing the business and viewing the process of expenditure of public funds. An example of Open Door violation may be to move the regularly posted meeting to a different time or location without giving notice. Another is to have a meeting in a location which is not accessible to those with disabilities . . . having a meeting on a second floor without ramp or elevator access is illegal. Another example would be holding a meeting while traveling – it is easy to have a quorum in a vehicle and to conduct business while traveling to a site, like the Annual Conference of SWCDs. The worst example may be to make a decision in secret and announce it in open meeting. Decision making and voting must be done in open meeting to allow the public access to the process.

In addition to the law citation, the Public Access Counselor publishes the Handbook on Indiana’s Public Access Laws to better explain the elements of this law. The website is: http://www.in.gov/pac/files/pac_handbook.pdf .

Sec. 6 Nepotism

Employment by public agencies “generally” excludes the employment of relatives. Indiana Code IC 4-15-7 and IC 4-15-7.1 are the citations for nepotism.

Chapter 7 (IC 4-15-7) Employment of Relatives by Public Officials is Prohibited

Sec. 1 (a) No person being related to any member of any state board or commission, or to the head of any state office or department or institution, as father, mother, brother, sister, uncle, aunt, a husband or wife, son or daughter, son-in-law or daughter-in-law, niece or nephew, shall be eligible to any position in any such state board, commission, office, or department or institution, as the case may be, nor shall any such relative be entitled to receive any compensation for his or her services out of any appropriation provided by law.

(b) This section shall not apply if such person has been employed in the same position in such office or department or institution for at least twelve (12) consecutive months immediately preceding the appointment of his relative as a board member or head of such office, department, or institution.

Examples of nepotism include the employment and supervision of family members. SWCD supervisors have hired their spouses and other family members as staff in early years. The situation leads to concerns of favoritism and other impropriety. It is best to hire non-related personnel.

Sec. 7 Dual Office Holdings

The Indiana Constitution prohibits dual office holding. One cannot hold two 'lucrative' public offices in Indiana.. The Indiana Attorney General has released a guide on dual office holding titled "Dual Office Holding Guide".

The guide points out that the Indiana Constitution prohibits "Dual Office Holding". Under Indiana Law some public servants cannot legally serve in more than one public service position at any given time. Violation of this law is referred to as "Dual Office Holding". Page 2 of the guide sets out the questions a person in a public service position should ask to determine whether accepting a second public service position violates the law before accepting the second position. At the bottom of page 2 the guide states that "no person may hold more than one lucrative office at a time except as expressly permitted in this Constitution". (for more information see Indiana Constitution, Article 2, Section 9). It further states (top paragraph of page 3) that "a person holds a lucrative office under this statute when he or she holds title to an office in which he or she is authorized to exercise some of the State's sovereign power and where the person is entitled to compensation. At the bottom of the same paragraph it states "such compensation can be salary or per diem (per day). It further states in the same paragraph "the office is considered lucrative even if a person chooses not to accept compensation as long as the person is entitled to pay affixed to performance of the offices duties. While this is not a legal opinion it would appear from the guidance cited above from the attached Dual Office Holding Guide that the office of SWCD Supervisor would be considered a "lucrative position" as it relates to the Indiana Constitution, Article 2, Section 9.

At the bottom of page 7, the guide also explains what happens if a person holding one lucrative office accepts another. It states "if a lucrative state office holder accepts a second lucrative state office, then the acceptance of the second lucrative office automatically vacates the first office". Again while this is not a legal opinion, it would appear that if for example a person serving on your County Council was elected or appointed as an SWCD Supervisor he or she could technically be automatically vacating their Council position.

It is the State Soil Conservation Board's responsibility to inform you of this document and the guidance it contains. However, it is the districts responsibility to inform anyone who is currently a Supervisor or is considering appointment or election for SWCD Supervisor about the "Dual Office Holding Guide" and further to encourage them to seek legal advice from the Attorney General's office if they have questions about its implications on the office of SWCD Supervisor. Please keep in mind that serving as an Associate Supervisor would not be considered a "lucrative" position and consider

offering that alternative to an individual who would like to serve the district but may be impacted by Dual Office Holding as defined in the guide.

The State Attorney General's "Dual Office Holding Guide" is available electronically at: http://www.in.gov/attorneygeneral/files/Dual_Office_Holding_Guide_2010.pdf.

Sec. 8 Conflict of Interest

SWCD supervisors and staff occasionally have goods, services or other (pecuniary interests) available to an SWCD; such interests may be beneficial to the district, but may constitute a conflict of interest and must be officially declared so in order to be legal. An example of this potential conflict of interest might be a contractor serving as a District Supervisor who may also be doing conservation practice installation for landowners who have received financial assistance for that practice through a conservation program offered by the conservation partnership and reviewed and approved by the SWCD board.

Failure to disclose potential conflict of interest can be a Class D Felony. The law is very specific and a form is required to be submitted to both the Indiana State Board of Accounts and the local county Clerk of the Circuit Court. A copy is forwarded to the Indiana State Ethics Commission by those authorities.

Citation on conflict of interest is: IC 35-44-1-3. To view the text as well as the required form visit: <http://www.in.gov/library/files/trconflict.pdf>. Form 236 (disclosure statement) is available at: <http://www.in.gov/sboa/files/Form236.pdf>.

Sec. 9 Non-discrimination

It is the policy of Soil and Water Conservation Districts to serve all clients without regard to race, color, religion, sex, national origin, age, disability or origin as required by the Indiana Civil Rights Law (I.C. 22-9-1), Title VI and VII (Civil Rights Act of 1964), and the Americans with Disabilities Act (42 USCS §12101, et. seq.).

Sec. 10 ADA Guidelines

The Americans with Disabilities Act (ADA), passed in 1990, prohibits discrimination against people with disabilities in employment and public services, public and private transportation, public accommodations and telecommunication services. The ADA covers private employers with 15 or more employees, employment agencies and all levels of government.

The District Law (IC 14-32) requires that SWCD meetings be held in accessible locations. It is crucial that attention to this detail be given when holding regular as well as special meetings and the District Annual Meeting. Holding an official event in a room (location) not served by a ramp or elevator so that the physically impaired may be denied access is illegal. Districts must be aware of limitations and strive to be accessible to all.

For specific regulations go to: <http://www.ada.gov/smbustxt.htm>

Sec. 11 Workplace Sexual and Other Harrasment

In 1986, the U.S. Supreme Court recognized sexual harassment as a form of illegal sex discrimination.

Sexual harassment is unwanted verbal or physical conduct of a sexual nature when:

- You must submit to this behavior to keep your job or to get a promotion, a good job assignment or some other job benefit; or
- This behavior unreasonably interferes with your work performance or creates an intimidating, hostile or offensive working environment.

An employer has the legal responsibility to investigate sexual harassment complaints and to take appropriate actions to end the harassment and make sure it doesn't happen again.

To view Indiana Civil Rights Commission's Sexual Harassment guide, visit:

<http://indiana.gov/icrc/files/sexualharassmentenglish.pdf> .

Sec. 12 Ethics

Ethics rules apply to all levels of public employment. "Upholding the Public Trust" is the basis of the rule. Nepotism and Conflict of Interest are ethics issues as well.

Ethics rules relate to the use of public property and work time (one's own paid time or that of his or her employee(s) for personal gain. Highlights of the rule include:

- Use of supplies/equipment: telephone, fax machine, copy machine, vehicles, etc.
- Personnel: a secretary to do personal correspondence, errands, etc. Employees to do personal work while on the public payroll. Accomplishing one's own personal activities while on the job.
- Political activity while on the job; or using employees to accomplish the same.
- Nepotism, the appearance is 'favoritism.'
- Acceptance of gifts from clients, the appearance is 'bribery.'
- 'Honoraria' – accepting payment of actions done on normally paid time

The Indiana State Ethics Commission website is: <http://www.in.gov/ig/> . The link has helpful information including publications, advice, and training information.

Sec. 13 EEO Policies

Federal Equal Employment Opportunity (EEO) Laws

What Are the Federal Laws Prohibiting Job Discrimination?

Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;

the Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;

the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older;

Title I and Title V of the Americans with Disabilities Act of 1990 (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;

Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified individuals with disabilities who work in the federal government; and

the Civil Rights Act of 1991, which, among other things, provides monetary damages in cases of intentional employment discrimination.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces all of these laws. EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies.

The complete law may be viewed at: <http://www.eeoc.gov/facts/qanda.html>

Sec. 14 Charity Gaming Activities

Qualified not-for-profit organizations may conduct certain types of legal gaming activities in Indiana. These activities include bingo, raffles, door prizes, pull tab, punch board, tip board, and other games (card, wheel, dice, etc.). To qualify and conduct a legal gaming activity, an organization must be a bona fide religious, educational, senior citizen, veteran, political, or civic/fraternal/charitable organization operating within Indiana and must be exempt from taxation under Section 501 of the Internal Revenue Code. As of 1996, exemption from gross income tax no longer qualifies an organization.

SWCDs are local subdivisions of state government and therefore do not qualify to participate in gaming activities.

However, “midway-style” games are not regulated by Indiana’s charity gaming law. Examples of such games are: cranes (win what crane lifts) and games of skill (darts, basketball, water gun races, coin plate or ring toss, golfing, target shooting, etc.). Auctions (silent or live), which are the sale of items to the highest bidder, also are not regulated by the charity gaming law and do not require any type of license from the Indiana Department of Revenue.

If there is any question as to the legality of a fund-raising activity by your district, contact your ISDA District Support Specialist.

.